# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1940

**No.** [illegible]

HARRY F. MEHLINK, as Trustee in Bankruptcy of the Estate of United Lamp & Shade Corp. (a corporation), Bankrupt,

*Petitioner,*

vs.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals

for the Ninth Circuit

and

SUPPORTING BRIEF.

JOHN WALTON DINKELSPIEL,
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vs.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
## to the United States Circuit Court of Appeals for the Ninth Circuit.

*To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Harry F. Meilink, Trustee in Bankruptcy of the estate of United Lamp & Shade Corp., a corporation,

Bankrupt, the petitioner above named, respectfully prays that a writ of certiorari issue to review a judgment entered December 12, 1940 in the United States Circuit Court of Appeals for the Ninth Circuit in the case numbered 9501, entitled "Unemployment Reserves Commission of the State of California, Appellant, v. Harry F. Meilink, as Trustee in Bankruptcy of the estate of United Lamp & Shade Corp., a corporation. Bankrupt, Appellee", reversing the judgment of the United States District Court for the Northern District of California, Southern Division; and in this behalf petitioner respectfully shows:

**OPINION OF THE COURT BELOW.**

The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered on the 12th day of December, 1940 and is set forth in the Transcript of Record at pages 32 to 44, inclusive, and the petition for rehearing filed with the Circuit Court of Appeals for the Ninth Circuit on the 10th day of January, 1941 was denied (Tr. 45) two months later, on the 10th day of March, 1941.

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**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

In the bankruptcy proceeding of United Lamp & Shade Corp., a corporation, a proof of claim (Tr. 6) was filed by the Unemployment Reserves Commission of the State of California for employer and employee contributions, demanding interest thereon at the rate of twelve per cent per annum. Your petitioner as

Trustee in Bankruptcy paid the principal sum of said proof of claim with interest thereon at the rate of six per cent per annum and filed an Objection (Tr. 7) to the twelve per cent per annum interest demanded, upon the ground that the difference between the six per cent per annum interest paid by him and the twelve per cent per annum interest demanded constituted a penalty within the purview of Section 57j of the Bankruptcy Act. (Title 11, U. S. C. A. Sec. 93j.) The Objection of the Trustee to the payment of the penalty came on for hearing before the Referee in Bankruptcy and the Objection of your petitioner to the payment of a penalty was sustained, the Referee in Bankruptcy (Tr. 9) directing the payment of interest at the rate of seven per cent per annum on the proof of claim upon the ground that said percentage was the legal rate of interest in the State of California.

The Unemployment Reserves Commission of the State of California filed a petition to review the order of the Referee in Bankruptcy (Tr. 15), and his Certificate and Report (Tr. 18) and his Order came on for hearing before the United States District Court for the Northern District of California, Southern Division, and an Order (Tr. 24) was duly made and entered by the District Judge approving and confirming the certificate and report and the order of the Referee in Bankruptcy. An appeal (Tr. 28) was taken from the Order of the District Court to the Ninth Circuit Court of Appeals and on the 12th day of December, 1940 its Order (Tr. 31) was duly made

and entered reversing the Order of the District Court for the Northern District of California, with instructions to approve the proof of claim with interest thereon at the rate of twelve per cent per annum.

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**QUESTION PRESENTED.**

Is interest at the rate of 12% per annum, which under the provisions of the Unemployment Reserves Commission of the State of California charged pursuant to Section 45 of the Unemployment Reserves Act of California, and which is 5% in excess of the legal rate of interest of the State of California of 7% per annum and which rate of interest of 12% is included in the proof of claim of the Unemployment Reserves Commission of the State of California, a penalty in bankruptcy rather than interest within the purview of Section 57j of the Bankruptcy Act?

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**STATUTES INVOLVED.**

Section 45 of the Unemployment Reserves Act (Chapt. 352, 1935 Statutes of California, page 1226), during the period the contributions and interest claimed by the respondent accrued read as follows:

> "If any employer defaults in any payment required of him, for himself or on behalf of employees under this act, he shall become *additionally liable* for interest on such payments at the rate of twelve per cent per annum from the date such payment becomes due, both principal

and interest being payable in the same manner as the contributions. Such payment and interest shall be collectible in the name of the fund in any manner practicable, including civil action by the commission against the defaulting employer." (Italics ours.)

Section 57j of the Bankruptcy Act (Title 11 U. S. C. A. Sec. 93j) during the period the contributions and interest claimed by the respondent accrued, read as follows:

"Debts owing to the United States, a state, a county, a district, or a municipality as a *penalty* or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (Italics ours.)

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## REASONS FOR GRANTING WRIT OF CERTIORARI.

### I.

### THE CIRCUIT COURT OF APPEALS HAS IN THIS MATTER DECIDED A MOST IMPORTANT QUESTION OF LAW IN CONFLICT WITH A CONTROLLING DECISION OF THE SUPREME COURT OF THE UNITED STATES.

The decision rendered by the Ninth Circuit Court of Appeals clearly conflicts with a decision of the United States Supreme Court in *New York v. Jersawit*, 263 U. S. 493, 68 L. Ed. 405, 44 Sup. Ct. 167, 2 A. B. R. (N. S.) 292, and there is found a factual similarity between the pending matter and the facts

disclosed in the above cited case. In *New York v. Jersawit,* supra, this Court had submitted to it for decision a statute of the State of New York providing for the payment of a penalty upon delinquent corporate franchise tax due the state. The Trustee in Bankruptcy interposed objections to a proof of claim filed, upon the ground that a penalty was being exacted for the neglect of the bankrupt corporation in making prompt payment of its tax, and this Court held that the State of New York was only entitled to receive simple interest instead of the twelve per cent per annum demanded.

The Ninth Circuit Court of Appeals in the pending matter has erred in its failure to follow the decision of this Court in *New York v. Jersawit,* supra, and in relying upon the decision of this Court in *United States v. Childs,* 266 U. S. 304, 69 L. Ed. 299, 45 Sup. Ct. 110, 5 A. B. R. (N. S.) 5, which is clearly distinguishable and not in point on both facts and the reasoning of this Court, since it relates to a *Federal* statute rather than a *State* statute as in the instant case.

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## II.

**THE CIRCUIT COURT OF APPEALS HAS IN THIS MATTER RENDERED A DECISION IN CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT OF APPEALS IN A SIMILAR MATTER.**

The decision of the Ninth Circuit Court of Appeals in the pending matter is clearly in conflict with the decision of the Third Circuit Court of Appeals in the

matter of *Pressed Steel Car Co. of New Jersey,* 100 Fed. (2d) 147, 38 A. B. R. (N. S.) 571, wherein the Third Circuit Court of Appeals sustained the objection of the Trustee in Bankruptcy to a proof of claim of the State of New Jersey demanding interest at twelve per cent per annum and ordered the payment of simple interest. A writ of certiorari to review this decision of the Third Circuit Court of Appeals was denied by this Court (306 U. S. 648, 83 L. Ed. 1047, 59 Sup. Ct. 589) on the 13th day of March, 1939. A factual similarity in the *Pressed Steel Car Co.* case and in the pending matter is clearly shown, in that the State of New Jersey and the State of California both demanded interest at the rate of twelve per cent per annum. The two decisions are in conflict due to the Third Circuit Court of Appeals reducing interest from twelve per cent per annum to simple interest and the Ninth Circuit Court of Appeals reversing the order of the District Court for the Northern District of California directing payment of seven per cent per annum interest and allowing interest at twelve per cent per annum.

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**CONCLUSION.**

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a

day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 9501, Unemployment Reserves Commission of the State of California, Appellant, v. Harry F. Meilink, as Trustee in Bankruptcy of the estate of United Lamp & Shade Corp., a corporation, Bankrupt, Appellee", and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,
April 25, 1941.

JOHN WALTON DINKELSPIEL,
*Counsel for Petitioner.*

DINKELSPIEL & DINKELSPIEL,
GRANT H. WREN,
JAMES M. CONNERS,
*Of Counsel.*

# Appendix.

# In the Supreme Court
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No.

HARRY F. MEILINK, as Trustee in Bankruptcy of the Estate of United Lamp & Shade Corp. (a corporation), Bankrupt,
*Petitioner,*

vs.

UNEMPLOYMENT RESERVES COMMISSION OF THE STATE OF CALIFORNIA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is printed in the record, pages 32 to 44, inclusive, and for brevity is not repeated here.

## II.

### JURISDICTION.

The jurisdiction of this Court is invoked under Section 240, as amended, of the Judicial Code, 28 U. S. C. A. 347.

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## III.

### STATEMENT OF THE CASE.

The essential facts of the case at bar are stated in the accompanying petition for writ of certiorari and in the interest of brevity are not repeated herein.

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## IV.

### SPECIFICATION OF ERROR.

The question involved is set out in the petition proper. To define the position of petitioner more precisely, it is specified that the Circuit Court of Appeals for the Ninth Circuit erred in holding:

That so-called twelve per cent per annum interest be paid by the Trustee in Bankruptcy to the Unemployment Reserves Commission of the State of California on its proof of claim for unpaid contributions and by doing so thereby ordered payment of a penalty of five per cent in excess of the legal rate of seven per cent per annum interest in the State of California, contrary to the provisions of Section 57j of the Bankruptcy Act.

## V.

### SUMMARY OF ARGUMENT.

We shall present our argument under two main headings, corresponding in order and substance to the reasons for granting the writ of certiorari stated in the petition proper and referring to the question and specification of error hereinabove mentioned.

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### POINT I.

### THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE CONTROLLING DECISION OF THIS COURT IN THE CASE OF NEW YORK v. JERSAWIT.

Your petitioner respectfully submits that the Ninth Circuit Court of Appeals erred in its failure to follow the decision of this Honorable Court in *New York v. Jersawit,* 263 U. S. 493, 68 L. Ed. 405, 44 Sup. Ct. 167, 2 A. B. R. (N. S.) 292. The facts in this decision of this Court disclose that the Trustee in Bankruptcy interposed objections to the rate of interest and a penalty demanded by the State of New York for delay in the payment of a delinquent corporate franchise tax due the state. In the matter involved in the within petition for a writ of certiorari, the State of California is also seeking to exact under the guise of interest a penalty for failure of the bankrupt corporation to make prompt payment of contributions due the State of California. The twelve per cent per annum interest on the contributions claimed is in excess of the value of the use of money at the normal return on funds during the contribution period

and Section 57j of the Bankruptcy Act prohibits the payment of any sum as a penalty or forfeiture, except for the amount of pecuniary loss sustained by the act out of which the penalty or forfeiture arose. The respondent in this proceeding was paid the full principal sum of the contributions owing it and any interest it is entitled to receive cannot exceed a normal rate of interest payable in ordinary business transactions. This Court in *New York v. Jersawit*, supra, found that twelve per cent per annum interest is more than the value of the use of money and affirmed that portion of the decision of the Second Circuit Court of Appeals ordering the payment of simple interest on the proof of claim of the State of New York. This Court in its opinion, in addition, held that the exaction of ten per cent per annum for failure to make prompt payment of the franchise tax to the state was also a penalty disallowed by Section 57j of the Bankruptcy Act and in affirming that portion of the decision of the Second Circuit Court of Appeals allowing six per cent per annum interest to the State of New York, holding that twelve per cent per annum interest is excessive, said in 68 L. Ed., page 407:

> *"As the 1 per centum is more than the value of the use of the money*, and is added by the statute to the 10 to make a single sum, it must be treated as part of one corpus and must fall with that. *We presume that, in this event, the state does not object to receiving the simple interest allowed. That part of the order will stand."* (Italics ours.)

The Ninth Circuit Court of Appeals in the pending matter predicated its decision reversing the order of the District Court upon *United States v. Childs,* 266 U. S. 304, 69 L. Ed. 299, 45 Sup. Ct. 110, 5 A. B. R. (N. S.) 5, and your petitioner respectfully submits that the distinction clearly shown in the facts of this case and the reasoning of this Court did not justify the Ninth Circuit Court of Appeals in relying upon the same. In *United States v. Childs,* supra, a bankruptcy proof of claim involving accrued *Federal* taxes and not a *State* tax was filed by the Collector of Internal Revenue. Interest at twelve per cent per annum as provided in Act October 3, 1917, 40 Stat. at L. 300, Chap. 63, Paragraph 212, was demanded and the Circuit Court of Appeals for the Second Circuit held that any interest in excess of six per cent per annum was in effect a penalty and was not saved by its name though it was imposed by the Legislature and within the legislative power. This Court properly reversed that decision and ordered payment of interest at the rate of twelve per cent per annum as provided in the *Federal* statute. In doing so, this Court based its reversal order on the ground that uniformity of interpretation of a *Federal* statute was essential in all the States and such uniformity must be had in order that no Federal District or Circuit Court could apply the legal rate of interest of the state in which the bankruptcy proceeding was pending when construing a *Federal* statute involved in a proof of claim to which objection has been interposed to the rate of interest demanded in excess of the legal rate of

the state or substitute a rate of interest depending upon the value of money then prevalent. In 69 L. Ed. 301, this Court said:

> "It makes the rate of interest that of a particular locality, differing with the locality,—in New York, as said by the government, 6 per cent; in the Middle West, 8 per cent; and on the Pacific coast, 10 per cent; *and abridges or controls a Federal statute by a local law or custom, and takes from it uniformity of operation.*" (Italics ours.)

Your petitioner submits that the Circuit Court of Appeals for the Ninth Circuit was not justified in relying upon *United States v. Childs,* supra. The Ninth Circuit Court was construing a statute of the State of California and not a *Federal* statute, so there was no question of uniformity of operation to be considered. There being no factual similarity whatsoever between the pending matter and the facts found in *United States v. Childs,* supra, the Ninth Circuit Court of Appeals should have followed the decision of this Court in *New York v. Jersawit,* supra. A factual similarity is evident between the pending matter and the *Jersawit* case due to proofs of claim having been filed respectively by the State of California and the State of New York. Your petitioner respectfully submits that the decision of this Court in *New York v. Jersawit,* supra, is controlling, that the opinion of the Ninth Circuit Court of Appeals is plainly in conflict with the same and that his petition for a writ of certiorari is justified.

The *New York v. Jersawit* decision has been cited by this Court in its recent decision in *Texas v. Donoghue,* 82 L. Ed. 264, 302 U. S. 284, 58 Sup. Ct. 192, 35 A. B. R. (N. S.) 143, and in its very recent decision in *Boteler v Ingels,* 84 L. Ed. 78, 308 U. S. 57, 60 Sup. Ct. 29, 41 A. B. R. (N. S.) 141. In *Texas v. Donoghue* at page 266, Justice Butler, speaking for the Court, said:

> "The bankruptcy court has jurisdiction under sovereignty that is independent of and foreign to that of the state. Moore v. Mitchell, 281 U. S. 18, 23, 74 L. Ed. 673, 676, 50 S. Ct. 175. *It is without power to enforce penalties imposed by the state for violation of its laws."* (Italics ours.)

Justice Black in the *Boteler v. Ingels* case also referred to the disallowance of tax penalties in bankruptcy proceedings and referred to the provisions of Section 57j of the Bankruptcy Act prohibiting the payment of the same. Your petitioner, in recognizing that the payment of interest of seven per cent per annum to the respondent in this matter is the maximum rate which it is entitled to receive, considered the payment of the additional five per cent demanded as being a penalty designed to compensate the respondent for delay in payment of its contributions. This Court has held that a court of bankruptcy is without power to enforce penalties imposed by the state for violation of its laws in the case of *Texas v. Donoghue,* supra, and for the purpose of determining the right of the respondent to exact a penalty your

petitioner is seeking the issuance of a writ of certiorari.

*New York v. Jersawit,* supra, has also been cited with approval in the case of *Pressed Steel Car Co. of New Jersey,* 100 Fed. (2d) 147, 38 A. B. R. (N. S.) 571, which will be discussed hereafter under Point II and in several decisions of the District Courts of the United States.

In the case of *In re 168 Adams Building Corporation* (D. C. Ill.), 27 Fed. Supp. 247, 40 A. B. R. (N. S.) 444, interest demanded by a county tax collector of the State of Illinois in a bankruptcy proof of claim in an amount in excess of the legal rate of interest in Illinois was reduced to the legal rate of five per cent. Circuit Judge Evans of the Seventh Circuit Court of Appeals, sitting as a District Judge, said on pages 249-250:

> "As to interest, penalties, costs, etc., which have accrued and which I am informed are large, they should be reduced to five per cent interest upon all unpaid taxes from the date their payment was lawfully and properly demanded.
>
> "This ruling is on the ground that complainant has come into this court for the allowance, protection, and enforcement of its claim. The legal rate of interest in Illinois is five per cent. * * *
>
> "It seems to me that the part of the claim which is for penalties or for excessive interest is vulnerable to objection, even though the tax itself may be immune from such attack. Title 11, U. S. C. A. Sec. 93(j); Ill. Stats. Chap. 120,

Sec. 165; *New York v. Jersawit*, 263 U. S. 493, 44 S. Ct. 167, 68 L. Ed. 405; In re Clark Realty Co., 7 Cir., 253 F. 938. * * *" (Italics ours.)

"The claim will be allowed with simple interest at five per cent from the date when demand for its payment was duly made."

*New York v. Jersawit*, supra, is also cited with approval in the case of *In re Denver and R. G. W. R. Co.*, (D. C. Colo.) 27 Fed. Supp. 983, 40 A. B. R. (N. S.) 520, wherein the facts disclose that the Treasurer of the State of Colorado was demanding a payment of twenty-four per cent per annum interest on its bankruptcy proof of claim. The District Court held that fixing such an excessive rate of interest was for the purpose of forcing payment of the tax when due and reduced the interest to the legal rate of six per cent per annum provided by the Colorado law. On page 984 the Court said:

"It is important to note that Sec. 57j, in addition to the debt, allows only the pecuniary loss sustained by the state as a result of the failure to pay the tax on time, plus such interest as may have accrued according to law. Legal interest in Colorado is 6%. No showing of any loss sustained by the state is made, other than interest from the date payment was due. Money, especially in these days, is not worth 2% a month and the money would not have drawn 2% a year had it been on deposit in a bank. See also In re 168 Adams Building Corporation, D. C., 27 F. Supp. 247.

"We think the intent of the legislature as manifested by this provision was to force payment of the tax when due.

"The petition is denied."

Your petitioner respectfully submits that the Ninth Circuit Court of Appeals has failed to carefully analyze the terms of Section 45 of the Unemployment Reserves Commission Act providing that the delinquent employer is penalized by becoming additionally liable for so-called interest if he fails to make prompt payment of his contributions. The following pertinent language found in *Remington on Bankruptcy,* Volume 2, pages 234-235 summarizes the position taken by your petitioner regarding the necessity of the Court ascertaining whether or not interest or a penalty is being exacted by taxing authorities:

> *"A penalty as contrasted with a tax has an essentially different aim, its primary purpose being to regulate conduct rather than to produce revenue,* whereas with a tax, the former purpose is only incidental. A tax is rarely imposed for an omission to act, *while a penalty is frequently, if not usually, so based.* Further distinction may be found in the facts that a penalty is more likely to be based upon a single act or failure to act rather than upon a series of acts, and that it also ordinarily has a less direct relation to the receipt of earnings by the one upon whom the burden falls which renders him able to pay it. *The label placed upon an imposition in a revenue measure is not decisive in determining its character. Although called a tax, it may in*

*fact constitute a penalty, and if so the courts will not shut their eyes to the fact,* but will give it the same legal effect as a *penalty* which is designated as such." (Italics ours.)

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**POINT II.**

**THE NINTH CIRCUIT COURT OF APPEALS HAS RENDERED ITS DECISION IN THE PENDING MATTER IN CONFLICT WITH THE PRESSED STEEL CAR CO. OF NEW JERSEY DECISION OF THE THIRD CIRCUIT COURT OF APPEALS.**

In addition to seeking the issuance of a writ of certiorari by this Court due to the failure of the Ninth Circuit Court of Appeals to follow the decision of this Court in the case of *New York v. Jersawit,* supra, your petitioner bases his petition for a writ of certiorari upon the conflict between the Ninth Circuit Court of Appeals decision in the pending matter and the decision of the Third Circuit Court of Appeals in the case of *Pressed Steel Car Co. of New Jersey,* 100 Fed. (2d) 147, 38 A. B. R. (N. S.) 571. In this case, in which the decision of this Court in the case of *New York v. Jersawit,* supra, was followed, the State of New Jersey had filed a bankruptcy proof of claim for franchise taxes demanding payment of interest at twelve per cent per annum. The Third Circuit Court of Appeals disallowed the interest demanded and directed payment of simple interest on the proof of claim. Citing *New York v. Jersawit,* supra, the Court said on page 153:

"One question remains. Is the appellant entitled to collect 1% per month upon its claims?

> Section 57j, 11 U.S.C.A. Sec. 93 (j), of the Bankruptcy Act, specifically referred to in Section 77B(k) as being applicable to reorganization proceedings prohibits the allowance of penalties upon claims in bankruptcy proceedings. *We think that there is no doubt that the interest rate of 1% per month for each month that the tax remains unpaid proposed to be levied by the statute* (P. L. N. J. 1919, ch. 118, p. 280, Sec. 1, Comp. St. Supp. N. J. 1924, Sec. 208-505a, as amended by P. L. N. J. 1927, ch. 261, p. 481, Sec. 1 supplementing L. 1884, ch. 159, p. 232, as amended by P. L. N. J. 1931, ch. 102, p. 171) *is a penalty. New York v. Jersawit*, 263 U. S. 493, 496, 44 S. Ct. 167, 68 L. Ed. 405. *In the case at bar we presume that the State of New Jersey will not object to receiving simple interest and if this be so, such interest should be allowed on the claims.*" (Italics ours.)

This Court denied a petition for writ of certiorari (see 83 L. Ed. 1047, 306 U. S. 648, 59 Sup. Ct. 589) on March 13, 1939.

In the matter involved in the pending petition for the issuance of a writ of certiorari, the decision of the Ninth Circuit Court of Appeals is in plain conflict with the Third Circuit Court decision above mentioned. In the pending matter as well as in the *Pressed Steel Car Co.* case the State of California and the State of New Jersey, respectively, were demanding interest at the rate of twelve per cent per annum on bankruptcy proofs of claim. The Ninth Circuit Court of Appeals allowed interest at the rate of twelve per cent per annum demanded and the Third Circuit

Court of Appeals reduced the twelve per cent per annum interest demanded to simple interest. The Trustee in the pending matter respectfully submits that this conflict in the decisions of two Circuit Courts of Appeal justifies the granting of his petition for a writ of certiorari.

Upon the foregoing considerations and for the several reasons herein specified, your petitioner respectfully prays that this Honorable Court take jurisdiction in the premises, issue its writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Dated, San Francisco, California,
April 25, 1941.

Respectfully submitted,
JOHN WALTON DINKELSPIEL,
*Counsel for Petitioner.*

DINKELSPIEL & DINKELSPIEL,
GRANT H. WREN,
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